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VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk / Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Rulemaking for the Public Service Commission to Create a New Regulation 103-811.5 Role of the Qualified, Independent Third-Party Consultant and Expert and the Commissioners' Reliance on the Contents of the Qualified, Independent Third-Party Consultant and Expert's Report Docket No. 2019-362-A

Dear Ms. Boyd:

Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively "the Companies" or "Duke"), pursuant to S.C. Code Ann. Regs. 103-818 and the Commission's August 14th Notice of Public Hearing and Opportunity for Comment, jointly submit these comments on Proposed Regulation 103-811.5. The Companies have previously submitted comments and recommendations in this docket in response to the Commission's notice of drafting.¹ These comments will focus on the serious legal issues that are raised by R. 103-811.5, as proposed by the Commission. We are also providing a red-lined version of the proposed rule showing changes that we recommend to address the legal issues identified in this letter.

Background

The Commission's authority to promulgate proposed regulation 103-811.5 comes from Act 62 of 2019 ("Act 62" or the "Act"), which, in part, addresses South Carolina's implementation of the requirements of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Relevant here, Act 62 directs the Commission to review each South Carolina electric utility's avoided cost rates and PURPA implementation every two years beginning six months from the Act's effective date, specifically including approving the utility's "standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary to implement this section." S.C. Code Ann. § 58-41-20(A). Act 62 also requires the Commission to retain an independent third-party consultant to issue a report on the utilities' calculation of

¹ See February 13, 2020 Comments, Docket Entry ID 290364.



avoided costs under S.C. Code Ann. § 58-41-20(A). Section 58-41-20(I) provides, in part:

The commission is authorized to employ, through contract or otherwise, third-party consultants and experts in carrying out its duties under this section, including, but not limited to, evaluating avoided cost rates, methodologies, terms, calculations, and conditions under this section. The commission is exempt from complying with the State Procurement Code in the selection and hiring of a third-party consultant or expert authorized by this subsection. The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section. The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified independent third party shall submit all requests for documents and information necessary to their analysis under the authority of the commission and the commission shall have full authority to compel response to the requests. The qualified independent third party's duty will be to the commission.

S.C. Code Ann. §58-41-20(I) (emphasis supplied).

With respect to the third party's report, Act 62 provides that "[a]ny conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility." S.C. Code Ann. § 58-41-20(I). Act 62 also grants the third party consultant the right to submit requests for documents and information to the parties under the authority of the Commission and directs the utilities to be "responsive in providing all documents, information, and items necessary for the completion of the report." *Id.* Notably, § 58-41-20(A)(2) also mandates that the "[p]roceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing."

Role of Third-Party Consultant Under Act 62

The role contemplated by Act 62 for the third-party consultant to assist with avoided cost issues in a proceeding under §58-41-20 is multi-faceted. The consultant is expected to do the following things:

- Submit a report to the Commission of the consultant's independently derived conclusions as to the utility's filings, based only upon information from the utility's filings, the record in the proceeding, and information requests from utilities;



- Conduct discovery to form the basis of its report by requesting documents from the utility as well as report on the responsiveness of the utility;
- Comply with “the same ex parte prohibitions contained in Chapter 3 of Title 58 as all other parties.”

The Companies assert that these provisions for the third-party consultant require that the consultant be treated like a party to the proceeding, that the consultant’s report be subject to discovery by other parties, and that the report be admitted into the record after other parties have an opportunity to cross-examine the consultant and offer objections to the admissibility of the report. This path is clearly within the bounds of Act 62 and is the path that provides the Commission with the broadest information possible upon which to make a decision.

Role of Third-Party Consultant Under Rule 103-811.5

The role of the third-party consultant, as outlined under R. 103-811.5 is significantly different from the role called for in Act 62. Under subsection A of proposed R. 103-811.5 the consultant will purportedly be subject to the ex parte prohibitions of S.C. Code Ann. § 58-3-260 and will be prohibited from communicating individually with the parties, but the consultant will be able to communicate privately with the Commission and its staff. The proposed rule includes detailed provisions for the report that the consultant is required to prepare and requires that report to be provided to the parties “at least ten (10) days prior to the Commission’s vote in the proceeding.” Since the Commission’s vote typically takes place well after a contested case hearing, it is inescapable that the proposed rule would provide no opportunity for the parties to respond to that report during the hearing which, as explained below, creates serious due process issues. Under subsections F and G of the proposed rule, the consultant’s report will be made a part of the record in the proceeding, but the consultant will not be subject to written discovery or deposition and will not testify or be subject to cross-examination and the parties will have no meaningful opportunity to respond—not only due to the fact that the hearing would be over, but also due to the fact that 10 days is not an appropriate response time for the type of highly technical analyses contemplated by the General Assembly when it provided for the retention of a third party consultant.

Legal Problems with Proposed Rule 103-811.5

A. South Carolina Constitution, Article I, Section 22

The role of the third-party consultant under proposed Rule 103-811.5 presents legal issues arising under Article I, Section 22 of the South Carolina Constitution. Article I, Section 22 applies specifically to administrative proceedings and provides that



[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

The South Carolina Supreme Court considered the applicability of Article I, Section 22 in *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011) when describing the roles of the Commission and the Office of Regulatory Staff (“ORS”) with respect to contested cases. In that case the Court reviewed the provisions of Act 175 of 2004 and explained that the creation of ORS addressed the requirement of Article I, Section 22 that there be separation between the prosecution and adjudication roles.

Thus, the PSC’s new role in ratemaking proceedings conforms to the general principle that the roles of investigator and adjudicator should be performed by separate persons. Cf. S.C. Const. Art I, § 22 (“[N]or shall [a person] be subject to the same person for both prosecution and adjudication....”); *Ross v. Medical University of S.C.*, 328 S.C. 51, 69–70, 492 S.E.2d 62, 72 (1997) (explaining that Article 1, Section 22 aims to prevent an adjudicator from becoming impartial by gathering “ex parte information as a result of prior investigation”).

Utilities Services, *id* at 761. Proposed Rule 103-811.5 violates the requirements of Article I, Section 22 by allowing the third-party consultant to fill the investigator role while also having private communications with the Commission and providing a report that is admitted into evidence. The consultant would act both as a private advisor to the Commission much like the Commission staff but would also submit evidence for the Commission’s consideration like other parties to the proceeding. That dual role violates Article I, Section 22.

The proposed rule runs afoul of Article I, Section 22 in another way. The proposed rule would allow the consultant’s report to be entered into the record after the hearing in the proceeding at a time when the parties would not have a meaningful time to respond to it. The South Carolina Supreme Court has held that Article I, Section 22 applies the fundamental requirements of due process to administrative proceedings including, “notice, an opportunity to be heard in a meaningful way and judicial review.” *Kurschner v. City of Camden Planning Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Moreover, in a quasi-judicial or adjudicatory proceeding, “the substantial rights of the parties must be preserved.” *Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). “It is generally held that these rights include a reasonable opportunity to cross examine the important witnesses against a party when their credibility is challenged.” *Id.*



Proposed Rule 103-811.5 would allow the consultant's report into the record after discovery and after the hearing and would admit that report with no witness to support it and no opportunity for the parties to challenge it on cross-examination.

B. The Administrative Procedures Act.

The provisions of proposed Rule 103-811.5 discussed above that allow the consultant's report to be admitted as evidence in a contested proceeding violate various provisions of the Administrative Procedures Act ("the APA"), S.C. Code Ann. §§1-23-320 *et seq.* The APA requires that parties to administrative proceedings be allowed to conduct discovery. See §1-23-320(C) and (D). Parties in administrative proceedings must be given an opportunity to conduct cross-examination (see §1-23-330(3)) and must have an opportunity to object to evidence offered into the record (see §1-23-330(1)). Under the proposed rule the consultant's report would be included in the record with insufficient notice, no opportunity for discovery and no opportunity for cross-examination or objection. For these reasons the proposed rule violates the APA.

C. Act 62.

As outlined above, Act 62 specifically subjects the third-party consultant retained to assist with proceedings under S.C. Code Ann. §58-41-20 subject to the *ex parte* provisions of §58-3-260. That requirement of Act 62 is violated by proposed rule 103-811.5. The proposed rule attempts to address the *ex parte* requirements by preventing the consultant from communicating with parties and treating the consultant as an advisor to the Commission like its staff. However, the proposed rule would allow the consultant to submit evidence in the proceeding like a party. Section 58-3-260 directs as follows:

Except as otherwise provided herein or unless required for the disposition of *ex parte* matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

The *ex parte* rule does not permit the type of dual role outlined in the proposed regulation, and the proposed regulation is therefore inconsistent with the requirements of Act 62. Since the Act requires the consultant's report to be made a part of the record, it is not possible for the consultant to also privately advise the Commission on issues in the proceeding.



Act 62 also requires that proceedings under §58-41-20 “shall include an opportunity for intervention, discovery, filed comments or testimony and an evidentiary hearing.” See §58-41-20(A)(2). That provision requires that such proceedings include the customary due process safeguards that are required by Article I, Section 22 and the APA and defeats any argument that the General Assembly intended to allow third-party consultants retained under §58-41-20(I) to be able to submit a report into the record without being subject to discovery and taking the witness stand.

Conclusion.

Proposed rule 103-811.5 as currently drafted is inconsistent with due process principles and Act 62, and it violates the ex parte communication provisions of S.C. Code Ann. § 58-3-260. Act 62 mandates that the consultant’s report be made a part of the record and that the ex parte provisions of §58-3-260 apply to the consultant. In order to comply with those mandates and the due process requirements discussed in these comments, the consultant’s report must be made available with ample time for other parties to effectively respond to it and the consultant must testify in support of the report. It follows that the consultant cannot also fill the role of private advisor to the Commission. The Companies submit that proposed R. 103-811.5 must be revised to make these changes and we have enclosed a red-lined version of the proposed rule with changes that we recommend.

Yours truly,

Frank R. Ellerbe, III

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Enclosure

c w/enc: Parties of Record (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Katie M. Brown, Counsel (via email)

103-811.5 Role of the Qualified Independent Third-Party Consultant and Expert and the Commissioners' Reliance on the Contents of the Qualified Independent Third-Party Consultant and Expert's Report.

A. Prohibition on Ex Parte Communication

(1) The qualified independent third-party consultant and expert is subject to the ex parte prohibitions contained in Chapter 3, Title 58 of the South Carolina Code ~~and, but the qualified independent third-party consultant and expert is not prohibited from communicating with the Commission and with the Commission Staff. The qualified independent third-party consultant and expert shall submit all requests for documents and information necessary to conduct its analysis under the authority of the Commission, and the Commission shall have full authority to compel responses from parties to the request.~~ The qualified independent third-party consultant and expert's duty will be to the Commission. No communications between the qualified independent third-party consultant and expert and any party regarding an issue before the Commission should be communicated without notice to all parties to the proceeding.

~~B.~~ (2) All communications between any party and the qualified independent third-party consultant and expert must be communicated to all parties contemporaneous with the original communication.

~~C.~~ (3) Upon retention by the Commission, the qualified independent third-party consultant and expert shall sign an acknowledgement of the ex parte prohibitions in Chapter 3, Title 58 of the South Carolina Code.

~~D.~~ (4) The qualified independent third-party consultant and expert shall submit a proposed procedural schedule for the timing of the development and issuance of its final report and its intended approach to complying with the ex parte prohibition provisions in carrying out its responsibilities to the Commission.

~~E~~B. Role

The role of the qualified independent third-party consultant and expert's duty is to submit a report to advise the Commission of the consultant's independently derived conclusions as to the utility's filings, based upon information from the utility's filings, the record in the proceeding, and the utility's responses to discovery requests. ~~and its role includes modeling its own data inputs and calculations via an independent analysis of an electrical utility's avoided cost. The role of the qualified independent third-party consultant and expert is not to rely solely on inputs from the utility or any other party so as to be constrained to working from the utility's or any other party's avoided cost data, inputs, and assumptions.~~

C. Discovery

(1) The qualified independent third-party consultant and expert shall submit all requests for documents and information necessary to conduct its analysis under the authority of the Commission, and the Commission shall have full authority to compel responses from parties to the request.

(2) The qualified independent third-party consultant or expert:

- a. Shall notify the parties to the proceeding of any recommendations or conclusions made by the qualified, independent third-party consultant or expert and provide a reasonable explanation of the bases for such recommendations or conclusions;
- b. May be deposed by any party pursuant to S.C. Code Ann. Regs 103-834;
- c. May be called to testify by the Commission or any party;

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- d. May be cross-examined by any party, including the party who called the qualified, independent third-party consultant or expert to testify; and
- e. May be required to respond to Written Interrogatories and Requests for Production of Documents and Things pursuant to S.C. Code Ann. Regs. 103-833.

D. Report

(1) ~~F.~~ All parties shall receive the final report at least ~~ten-twenty-five~~ (~~+250~~) days prior to the start of the evidentiary hearing. ~~Commission's vote in the proceeding.~~ Parties must be given a reasonable opportunity to respond in writing to the final report prior to the Commission's vote in the proceeding. ~~The qualified independent third party consultant and expert's duty is to the Commission, and the qualified independent third party consultant and expert is not subject to responding to discovery, may not be deposed, will not be cross-examined or called to testify before the Commission.~~

(2) ~~G.~~ The final report shall be included in the record and considered evidence along with all other evidence in the proceeding and will be given the appropriate weight as the Commission may with any evidence in the record.